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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Telecommunications Act of 1996	)	CC Docket No. 96-115
Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	)	

AT&T REPLY TO OPPOSITIONS TO AND COMMENTS ON PETITIONS FOR RECONSIDERATION

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Pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, and its Public Notice, Report No. 2280, published in 63 Fed. Reg. 31775 (June 10, 1998), AT&T Corp. ("AT&T") replies to oppositions to and comments on petitions for reconsideration of the Commission's February 26, 1998 Second Report and Order, FCC 98-27 ("CPNI Order"), governing carriers' use of Customer Proprietary Network Information ("CPNI").[1]

I. THE PROHIBITION ON USE OF CPNI FOR WINBACK, ABSENT CUSTOMER APPROVAL, IS ANTICOMPETITIVE AND SHOULD BE RESCINDED.

As AT&T showed in its June 25 pleading (at 3-5), the petitions overwhelmingly confirm that the Commission's prohibition on use of CPNI, absent customer approval, for marketing purposes once the customer has switched its services to another carrier, should be rescinded. Indeed, the current round of comments evinces broad support for lifting the winback

[1] Unless otherwise noted, all citations herein are the parties' June 25, 1998 Oppositions to or Comments on Petitions for Reconsideration.

prohibition for competitive carriers. AirTouch at 9-11; BAMs *in passim*; Cable & Wireless at 3; Celpage at 9-11; MCI at 15-16; PCIA at 15-16; Sprint at 3-4. As Arch (at 5) explains, the winback restriction as applied to competitive carriers suppresses competition to the detriment of consumers. The rule should therefore be promptly rescinded.

By contrast, a number of parties contend that ILECs should be subject to winback restrictions, particularly with respect to customer retention efforts, because of their unique ability to exploit their "gatekeeper" status that provides them with advance notice of the customer's intent to change carriers. Sprint at 3; Frontier at 4; MCI at 16; TRA at 7. As several parties explain, a winback restriction is needed to constrain the anti-competitive practices of incumbent local exchange carriers ("ILECs") because they "act as both wholesalers of communications services and facilities to competitive carriers, and as dominant retail competitors offering the same or similar services to the public. The wholesale function gives the ILECs enormous access to detailed information on a competitive carrier's activities, customers and business strategies, which the ILECs store, retrieve, and use to compete in the retail market." Allegiance at 3-4; *see also* Commonwealth Telecom at 5; Cable & Wireless at 3-4; Focal at 4-5; Intermedia at 1-5; KMC at 4-5; TRA at 7. Thus, a narrowly focused rule directed at ILEC retention marketing that guards against exploiting their gatekeeper function and using other carriers' information for winback is appropriate to implement Section 222(b) of the Act. Frontier at 4; Sprint at 3; MCI at 16-19.

At the same time, as MCI explains (at 16), "the bidding between two competitive carriers that occurs when one such carrier tries to win back a customer who has chosen to switch to another is the essence of competition." The Commission should promptly rescind the winback prohibition, which is fully consistent with Sections 222(c)(1) and (d)(1), that would preclude such pro-consumer marketing.

II. THE PROHIBITION ON THE USE OF WIRELESS CPNI FOR MARKETING OF MOBILE HANDSETS AND RELATED INFORMATION SERVICES SHOULD BE LIFTED.

As AT&T showed in its June 25 pleading (at 5-9), every wireless service provider that petitioned for reconsideration of the *CPNI Order* objects to the Commission's decision to restrict the use of CPNI for integrated marketing of wireless telecommunications services, information services, and equipment. These parties show that this unnatural demarcation will undermine carriers' ability to differentiate their offerings, frustrate customer access to improved wireless services, and impair efficient use of radio spectrum, all of which run counter to long-term Commission objectives. No one has offered a countervailing view. Indeed, the current round of pleadings also demonstrates that Section 222 does not compel this anticompetitive and anti-consumer result. Ameritech at 1; SBC at 1-5; AirTouch at 9-11; Arch at 3-4, 8-9; BAMs at 1-13; BellSouth at 5; Celpage at 3-6; PCIA at 9-14. Accordingly, the Commission should promptly hold that a wireless carrier is permitted to use wireless CPNI to market the appropriate mobile handset and information services to a customer because providing each is "necessary to, or used in, the provision of such telecommunications service" under Section 222(c)(1)(B).

III. THE PROHIBITION ON THE USE OF LANDLINE CPNI FOR MARKETING OF RELATED CPE AND INFORMATION SERVICES SHOULD BE LIFTED FOR COMPETITIVE CARRIERS ONLY.

The BOCs and other ILECs asserted in their petitions that the Commission should broadly allow the use of landline CPNI for marketing of CPE and information services. *See* AT&T at 10 (*citing* parties); Ameritech at 1; GTE at 3-8; SBC at 1, 5-10. However, as MCI explains (at 31), allowing use of CPNI to market CPE and information services would greatly favor the ILECs.

Thus, as AT&T showed (at 10-11), the BOCs and other ILECs should <u>not</u> be permitted to use local landline CPNI, absent customer approval, for the marketing of CPE and

information services at this time. By contrast, competitive carriers could not leverage market power into nonregulated markets and consumers would realize significant benefits, including increased choice and convenience, if the Commission allowed them to use CPNI to market CPE and information services. AT&T at 11-12, *citing* parties; e.spire at 6-7; Frontier at 5. At a minimum, the Commission should allow competitive carriers to use CPNI for current or future offerings that are closely related to the underlying telecommunications service, such as customized billing arrangements, enhanced announcements on toll-free calls, voice mail for virtual private network customers, and software that permits customers to track, manage and perform simple diagnostics and maintenance on their telecommunications services.

IV. THE ELECTRONIC AUDIT TRAIL REQUIREMENT SHOULD BE ELIMINATED AND CARRIERS SHOULD BE PERMITTED FLEXIBILITY TO DEVELOP CPNI CONSENT TRACKING OTHER THAN THE FIRST SCREEN REQUIREMENT.

A. Electronic Audit Trail. There is broad consensus among petitioners and those responding to the petitions that the *CPNI Order*'s electronic audit trail requirement should be eliminated. AirTouch at 2-6; Arch at 5-6; Bell Atlantic at 11; BellSouth at 3, 11; e.spire at 5; Frontier at 3; GTE at 16; MCI at vi; SBC at 19; Sprint at 8. As BellSouth explains (at 3, 11), the electronic audit trail imposes significant and undue costs while producing no attendant benefit that could not be achieved through less costly means. Thus, there is no justification for imposing billions of dollars of costs on the industry. AT&T at 14 (*citing* parties). And, AT&T (at 15-16) and Sprint (at 8) demonstrate that even an electronic audit mechanism that applies solely to marketing and sales system does not pass muster under a cost/benefit analysis. Further, as several parties confirm, development could be expected to take 2-4 years and could not be accomplished within the 8 months provided by the Commission. *See, e.g.*, AT&T Pet. at 13; MCI Pet. at 36; LCI Pet. at 6.

In short, the alternative safeguards already imposed by the Commission make any sort of mandatory electronic audit trail superfluous. However, if the Commission believes some other safeguard is required, random compliance audits are far preferable to elaborate electronic trails. AT&T at 16-17; Frontier at 3.

B. First Screen. Most parties also support the elimination of the first screen flag requirement, particularly if it would be extremely costly for their systems to comply with this rule. *See, e.g.*, AirTouch at 2-6; Arch at 5; Bell Atlantic at 11; e.spire at 5. Thus, the Commission should allow carriers flexibility to use alternative CPNI consent status tracking mechanisms where establishing the first screen requirement is not practicable. As both AT&T (at 17-18) and Cable & Wireless (at 8) suggest, an appropriate and more cost-effective alternative to the first screen requirement is a centralized customer consent database.

Only MCI (at 52) objects to this alternative approach, contending that a sales representative may forget to consult the centralized database. This is sheer speculation on MCI's part, and it is quite obvious that a sales representative could likewise forget to consult the first screen. With proper training, sales, marketing and customer care employees can be instructed to access the customer consent database in those situations where out-of-category sales activity is contemplated. In all events, as AT&T (at 18, *citing* parties) and other showed, 8 months is insufficient time for compliance. Thus, in addition to recasting the rules to allow carriers some implementation flexibility where required, the Commission should extend the compliance time frame for tracking of customer consents to 24 months.

V. THE COMMISSION SHOULD APPROPRIATELY CONSTRAIN BOC AND OTHER ILEC USE OF LOCAL CPNI TO GUARD AGAINST DISCRIMINATORY, ANTICOMPETITIVE USE.

A number of parties confirm AT&T's view that the *CPNI Order* bestows advantages on all ILECs with respect to the use of monopoly local CPNI under a "total service" approach.

Intermedia at 6-9; MCI at 10; WorldCom at 3-6. As Intermedia (at 8-9) demonstrates, transfer of information to a BOC affiliate without the customer's affirmative written consent constitutes an unfair use of the BOC's power in local markets. Section 272 was designed to ensure that the 272 affiliate should not obtain such an information advantage by its association with the BOC. Thus, as WorldCom (at 5) explains, the Commission was absolutely wrong in failing to apply Section 272 nondiscrimination requirements to the BOCs.

Predictably, the BOCs all support the Commission's ruling that cedes exclusively to them and their affiliates the ability to gain such use of their local monopoly CPNI. Ameritech at 7-8; Bell Atlantic at 3; SBC at 11; U S WEST at 6-9, 19. Indeed, a few ILECs suggest that application of Section 272 requirements (or analogous nondiscrimination obligations under Sections 201(b) and 202(a) for independent ILECs) would contravene the consumer privacy protections of Section 222. Ameritech at 7-8; GTE at 20-21; SBC at 12; U S WEST at 6-9. Quite the contrary, as AT&T demonstrated (at 21), the Commission can reconcile its customer privacy concerns with the Congress' nondiscrimination requirements simply by ensuring that ILEC affiliates could not obtain access to the CPNI of ILEC customers without first obtaining affirmative written consent from those customers, as any unaffiliated carrier would need to do.[2]

Given its conflict with Section 272, the Commission's ruling as to BOC use of CPNI must be promptly reconsidered. Moreover, and contrary to GTE's assertions (at 11-14), the Commission has ample authority to consider and address the monopoly of all ILECs and to restrain their ability "to capitalize on local exchange CPNI in a 'total service' relationship when the ILEC's

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[2] This imposes no disadvantage on Section 272 affiliates. Like CLECs, the Section 272 affiliate would be able to access (without affirmative written consent) the local CPNI of its customers so long as the 272 affiliate (and not the BOC) is the local service provider to the customer.

access to that CPNI evolved through a regulated monopoly rather than by a customer's free choice." AT&T at 22, *citing* Comcast Pet. at 22.[3]

VI. THE COMMISSION SHOULD GRANDFATHER EXISTING APPROVALS OBTAINED BY CARRIERS IN GOOD FAITH PRIOR TO RELEASE OF THE CPNI ORDER.

To further efficiency and avoid customer confusion, in its Petition (at 18-22), AT&T asked the Commission to clarify that the new CPNI rules have prospective application only and that it may continue to rely on the express approvals it obtained from customers, consistent with the provisions of Section 222(c)(1) of the Act, prior to release of the *CPNI Order*.

MCI (at vi, 46-47) contends that AT&T's consents should not be grandfathered because they were not preceded by the detailed notice required by the *CPNI Order* and thus do not constitute what MCI considers an informed consent under the Commission's interpretation of Section 222. In response to AT&T's offer to send these customers a detailed notice of rights, MCI asserts (at 47) that after-the-fact notification cannot salvage theses prior consents. MCI further maintains that it would be competitively disadvantaged if AT&T were permitted to rely on these approvals. GTE (at 24) and U S WEST (at 16) contend that only written approvals should be grandfathered to ensure customers knew their rights, even if the notice did not conform to the requirements of the *CPNI Order*.

MCI, GTE and U S WEST are wrong. Before the Commission released its *CPNI Order* more than two years after the 1996 Act was enacted, the only direction regarding the acquisition of approvals under Section 222(c)(1) was in the Act itself which stated that "with the

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[3] *See* AT&T Comments, CC Docket No. 96-115, filed March 17, 1997 (as to express delineation of BOC CPNI obligations under Sections 272 and 274). Sections 201(b) and 202(a), along with Sections 4(i), 251(c), 303(r) of the Act, provide authority for the FCC to achieve this result with respect to all ILECs' use of CPNI. LCI Pet. at 15.

approval of the customer," a carrier could use CPNI for purposes other than set forth in that section. AT&T relied on that statutory provision. Indeed, in the *CPNI Order* (para. 87), the Commission specifically concluded "that the term 'approval' in Section 222(c)(1) is ambiguous because it could permit a variety of interpretations."

Although the precise wording of the scripts used by AT&T does not meet the detailed notice requirements of the subsequent *CPNI Order*, the non-trivial percentage of individuals who said "No" is an extremely strong indication that, consistent with the Commission's objective, customers understood AT&T's explanation, understood their rights and -- where it was given -- consent was informed. Contrary to MCI's allegation, AT&T's statisticians advise that the split of approvals (85.9%) and denials (14.1%) indicates that the Commission can safely conclude that consumers really meant what they said. AT&T Pet. at 20. Equally clear, the AT&T Wireless approvals were part of the service contract (*not* a bill insert, as MCI (at 45) suggests) that governs the overall customer-carrier relationship and thus, like a tariff, have full indicia of reliability.

There is nothing inconsistent with the approvals that AT&T obtained and the statutory approval requirements of Section 222(c)(1). It is quite apparent that the FCC in establishing the notice and approval requirements of the CPNI Order was not merely interpreting statutory language but was creating some requirements of its own and formulating policy to fill in the gaps left by Congress.[4] Nor, contrary to MCI's suggestion, is there anything in the *CPNI Order* that retroactively invalidates theses approvals. Likewise, there no basis for concluding that only prior

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[4] *See CPNI Order*, n.64 *citing* Morton v. Ruiz, 415 U.S. 199, 123 (1974) (power of an agency to administer a program necessarily requires formulation of policy and making of rules to fill any gaps); para. 130 (FCC discussing whether it should allow oral notice and simultaneous consent); para. 135 (stating we should establish minimum notice); para. 139 (notice with technical jargon may not comply with our idea of notice).

written consents should be grandfathered, given that neither the Act nor the *CPNI Order* requires that form of approval for out-of-category marketing. It would be an incredible waste of resources and irritating to customers who had already given consent for AT&T to contact them again for their approval. Recognizing this fact, Sprint (at 9) strongly agrees with AT&T that the Commission should grandfather all prior express consents. Similarly, Cable & Wireless (at 6) affirms that grandfathering is necessary to avoid customer confusion and annoyance. Allowing carriers to grandfather prior approvals will not competitively disadvantage MCI who, like these other carriers, could have pursued seeking such approvals.

VII. THE COMMISSION SHOULD CLARIFY, AT A MINIMUM, THAT ANY ADDITIONAL STATE NOTIFICATION REQUIREMENTS WILL HAVE PROSPECTIVE APPLICATION ONLY.

In its petition (at 22-23), AT&T urged the Commission to hold that the FCC CPNI notice requirements are preemptive and that a state may not prescribe additional notice requirements or, at a minimum, that such additional notice requirements would not invalidate prior consents. A failure to so hold could put carriers at peril of expending millions of dollars in soliciting customer approval only to find that the notice does not comply with after-the-fact state-imposed notice requirements. Although no one commented on this aspect of AT&T's petition, AT&T notes that a recent submission by the Texas Commission highlights the need for this relief.[5] The Texas CPNI notice requirements diverge from the federal rule in a number of respects.[6] Most importantly, the

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[5] *See* Comments of the Public Utility Commission of Texas on Telecommunications Carriers' Use of Customer Proprietary Network Information, CC Docket No. 96-115, dated June 24, 1998, Attachment CPNI -- TX, proposed PUCT Rule 26.122(f).

[6] For example, in addition to the FCC requirements, Texas also proposes to require carriers to include statements that (i) failure to give approval may not eliminate all marketing contacts from the carrier; (ii) there is no charge to customers for restricting CPNI; and (iii) an explanation of when carriers may use CPNI to market services other than those to which the customer

(footnote continued on following page)

Texas rule would preclude any solicitation of approval until after the carrier has complied with the FCC's first screen and electronic audit trail requirements.[7] Not only has the entire industry vehemently opposed these computer database requirements, but they do not even take effect under the FCC's rules as written for a period of 8 months. Thus, Texas would, in effect, preclude carriers from seeking CPNI approvals pending implementation of these safeguards, which may never need to be implemented.

CONCLUSION

For the reasons stated above and in AT&T's Petition and June 25 pleading, the Commission should reconsider and clarify its newly adopted CPNI rules.

Respectfully submitted,

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(footnote continued from previous page)

subscribes even if the customer has restricted CPNI use. *Id.*, proposed PUCT Rule 26.122(f)(1)(D), (E) and (H).

[7] *Id.*, proposed PUCT Rule 26.122(g)(1) and (3).

CERTIFICATE OF SERVICE

I, Ann Marie Abrahamson, do hereby certify that on this 8th day of July, 1998, a copy of the foregoing AT&T Reply to Oppositions To And Comments On Petitions For Reconsideration was served by U.S. first class mail, postage prepaid, to the parties listed on the attached Service List.

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